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No. 96-541

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

I. Whether Petitioners have presented a federal question.

II. Whether the Court should dismiss the Petition as untimely.

III. Whether the Petition should be denied because Petitioners lack standing to file the Petition.

IV. Whether the Petition should be denied because Petitioners failed to properly raise the issue of judicial disqualification in the state court of last resort.

V. Whether the Petition should be denied because petitioners have failed to allege constitutional grounds requiring the disqualification of Justices Rose and Young.

VI. Whether the Petition should be denied as moot.

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SUPREME COURT OF THE UNITED STATES

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IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, AND THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,
Petitioners

Opposition to Petition for Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

Respondent Justices Robert Rose and C. Clifton Young request that the Court deny the petition for a Writ of Mandamus or Prohibition, or, in the Alternative, for a Writ of Certiorari seeking review of an opinion of the Supreme Court of Nevada. The Nevada Supreme Court opinion was entered in *Del Papa v. Steffen*, and is reported at 920 P.2d 489, filed July 12, 1996. For the convenience of the Court, all citations to Petitioners' appendix will be

to Petitioners' App., and all citations to Respondent Attorney General of the State of Nevada's appendix will be to Respondent Att. Gen.'s App.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a) because there is no federal question at issue and Petitioners failed to present a federal question for review to the Nevada Supreme Court. The Petition for Writ of Certiorari is not timely and therefore the Court does not have jurisdiction under Supreme Court Rule (Sup. Ct. R.) 13 and 28 U.S.C. § 2101(c) (1995). 28 U.S.C. §1651(a)(1995) is not a grant of jurisdiction and writs in aid of jurisdiction may issue only where this Court may otherwise properly exercise jurisdiction.

OPINION BELOW

In the proceedings below, the opinion granting a writ of prohibition against the Petitioners was entered on April 25, 1996, and is reported at 915 P.2d 245. Petitioners seek review of an opinion filed July 12, 1996, reported at 920 P.2d 489, which reaffirmed the final judgment entered on April 25, 1996.

STATEMENT OF THE CASE

Respondent Justices Robert Rose and C. Clifton Young respectfully oppose the petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari. The petition is flawed in many respects: it fails to present a federal question; it was untimely filed; Petitioners lack standing to sue because they have not suffered a personal injury; Petitioners never formally raised the issue of judicial disqualification in the state court of last resort; Petitioners failed to allege a ground for judicial disqualification which is of constitutional dimension; and

Petitioners' claim is moot. The petition should therefore be denied.

A. Course of Proceedings and the Disposition of the Case Below.

The matter below is a bitter and protracted dispute within the Nevada Supreme Court. The origin of the dispute was an inquiry by the Nevada Commission on Judicial Discipline (Discipline Commission) into the conduct of a trial judge named Jerry Whitehead. Whether Judge Whitehead misbehaved is now moot because he resigned some time ago. Respondent Att. Gen.'s App. G, at 176a. Whether the Discipline Commission misbehaved in investigating Judge Whitehead is now moot because of the judge's resignation. Whether Justices of the Nevada Supreme Court misbehaved in addressing the alleged misbehavior of the Discipline Commission is now moot for the same reason. In any event, the relations *inter sese* of the members of the Nevada Supreme Court are a matter of Nevada law. Despite the contention and confusion, no person was deprived of life, liberty, or property by any judgment below. Hence, there is no matter under 28 U.S.C. §1257 for this Court to consider.

On July 22, 1993, then Nevada District Court Judge Jerry Carr Whitehead petitioned the Nevada Supreme Court for a writ of prohibition or a writ of mandamus directing the Discipline Commission to cease all actions and proceedings against him. Whitehead alleged that the Discipline Commission, which was investigating him for alleged misconduct, was, among other things, violating the Nevada statutory mandate of confidentiality during its investigation. Whitehead requested that all matters in the writ petition be kept confidential. The Nevada Supreme Court granted that request. Respondent Att. Gen.'s App. F, at 174a-175a.

On October 10, 1993, the Las Vegas Review-Journal newspaper reported the existence of the confidentiality order. The newspaper asserted that Justices Steffen and Springer, Petitioners here, had imposed the secrecy order to help Whitehead, who was a political ally of both Justices. Over the next several years, the newspaper repeatedly criticized Justices Steffen and Springer with regard to their participation in the Whitehead case.

On November 16, 1993, Whitehead requested that then Chief Justice Robert Rose disqualify himself from the case for alleged bias in favor of the Nevada Attorney General, who was acting as counsel for the Discipline Commission. Justice Rose initially refused to disqualify himself. Respondents' App. A, at 1a-9a. However, after concluding that the issue of his disqualification would delay the proceedings and shift the focus away from the merits of the case, Justice Rose voluntarily recused himself. Respondents' App. B, at 16a.

Justice C. Clifton Young had voluntarily recused himself at the outset of the case because he had been the Nevada Supreme Court's representative on the Discipline Commission. District Judge Adelliar D. Guy and retired Senior Nevada Supreme Court Justice David Zenoff replaced Justices Rose and Young. These judges joined Justices Tom Steffen, Charles Springer, and Miriam Shearing ("the Whitehead court") to adjudicate the merits of Whitehead's writ petition.

On September 9, 1994, the Whitehead Court by an unpublished order granted Whitehead's writ petition and halted the Discipline Commission's investigation of Whitehead. On February 24, 1995, the Whitehead Court issued a published opinion that basically restated the contents of the unpublished order. *See Whitehead v. Nevada Comm'n on Judicial Discipline*, 893 P.2d 866 (Nev. 1995). Essentially, the opinion stated that the Discipline

Commission did not follow rules of confidentiality and conduct afforded to judges in other investigations when it investigated Whitehead, ordered the Discipline Commission to cease its investigation of Whitehead, and issued directions the Discipline Commission was to follow if it resumed its investigation of Whitehead. Before the Discipline Commission could conduct a new investigation, Whitehead resigned from the bench in order to avoid being prosecuted by the United States Department of Justice. Respondent Att. Gen.'s App G, at 176a.

On September 1, 1995, Justices Steffen and Springer, along with retired Senior Nevada Supreme Court Justice Zenoff and District Judge Guy, entered an order appointing a special master to discover the source of the leak and to investigate the "causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the [Whitehead case]". Petitioners' App. D, at 85a, 88a. This appointment of a special master was extraneous to the merits of the Whitehead case. Also, Whitehead had by then resigned as a judge.

On September 15, 1995, Nevada Supreme Court Justices Rose, Young, and Shearing issued an order vacating the appointment of the special master. Petitioners' App. B at 7a, 8a. The order stated that expenditure of public funds for the special master required approval of three elected Justices of the court, so that the appointment of the special master in conjunction with two visiting judges was void. On December 15, 1995, Justices Steffen and Springer held that the foregoing September 15, 1995 order filed by Justices Rose, Young, and Shearing was itself void because Justices Rose and Young were disqualified in the original Whitehead case. *Whitehead v. Comm'n on Jud. Discipline*, 908 P.2d 219 (Nev. 1995). This is the contention that Petitioners Steffen and Springer advance in this petition.

On December 21, 1995, Nevada's Attorney General, Frankie Sue Del Papa, then filed a petition to enforce the discharge of the special master. Respondent Att. Gen.'s App. A, at 1a. On December 22, 1995, Justice Springer moved to disqualify Justices Rose, Young, and Shearing from adjudicating the Attorney General's Petition. Respondent Att. Gen.'s App. B, at 131a. Justice Springer's motion was denied because it was not supported by affidavits as required by Nevada Rule of Appellate Procedure (NRAP) 35(b), was not accompanied by proof of service on opposing counsel as required by NRAP 35(d), and was not accompanied by "a brief of legal points and authorities setting forth specifically and under separate headings the legal basis for each ground alleged in the motion or charge" as required by NRAP 35(c). Respondent Att. Gen.'s App. C, at 141a, 142a.

On March 15, 1996, Justices Rose, Young, and Shearing held Justices Steffen and Springer disqualified from adjudicating the merits of the Attorney General's application. Respondents' App. C, at 19a-21a. Justices Steffen and Springer were expressly given the opportunity to file formal motions to disqualify Justices Rose, Young, and Shearing from considering the Attorney General's writ petition; however, no such motions were filed. Respondents' App. C, at 21a. On April 25, 1996, Justice Rose, Young, and Shearing granted the Attorney General's petition. *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996). On July 5, 1996, Justices Steffen and Springer filed a two-judge "per curiam" supplemental opinion attempting to void the April 25, 1996 opinion. *Whitehead v. Comm'n on Jud. Discipline*, 920 P.2d 491 (Nev. 1996), *stricken as void*, *Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996).

On July 12, 1996, Justices Rose, Young, and Shearing filed another opinion expressly reaffirming the September 15, 1995 administrative order and implicitly reaffirming the

April 25, 1996 opinion. *Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996). Justices Steffen and Springer filed their petition to the United States Supreme Court in response to the July 12, 1996 opinion.

SUMMARY OF ARGUMENT

The Petition does not present a federal question, and therefore there is nothing for this Court to consider pursuant to 28 U.S.C. §1257. The petition is not timely, having been filed approximately 165 days after the final judgment in this matter was filed on April 25, 1996. Petitioners' lack standing to file this petition because they have shown no personal injury to be remedied by this Court. Petitioners have not preserved the issue of judicial disqualification because they failed to present the issue to the Nevada Supreme Court in a formal motion for disqualification pursuant to NRAP 35. Petitioners have not asserted that either Justice Rose or Justice Young had a direct, personal, substantial, and pecuniary interest which this Court in *Aetna* held constitutionally disqualified a judge from adjudicating the case in which he or she had the interest. Finally, Petitioners' claim is moot.

REASONS FOR DENYING THE WRIT

A. No Federal Question is Presented in the Petition.

There is nothing for this Court to address under 28 U.S.C. §1257.

The essential contention of Petitioners is that Justices Rose and Young had a duty under the Due Process Clause of the 14th Amendment to have continued their initial voluntary recusal in this ugly intramural dispute. A fragment of this Court's decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), is cited in support of that

contention. At the end of the day in the proceedings below, however, no person was deprived of liberty or property--although the Nevada Supreme Court was deprived of its judicial integrity. If Petitioners Steffen and Springer were "deprived," it was in having decisive weight withheld from their votes in the disputes below. But that deprivation, if it was such, was the resultant of the very Nevada law under which Petitioners claim their right to vote. In any event, if Justices Rose and Young were disqualified for interest at the outset, Justices Steffen and Springer were equally disqualified by the time this matter came to rest below. Accordingly, if there is a federal issue here, it is so exiguous as not to warrant this Court's intervention.

B. The Petition Was Untimely.

A petition for a writ of certiorari to review a judgment of a state court must be filed within ninety days after entry of the judgment sought to be reviewed. Sup. Ct. R. 13(1). The actions complained of, i.e., that Justices Rose and Young improperly reentered the case after they had disqualified themselves, occurred by way of administrative order entered September 15, 1995 by Justices Rose, Young, and Shearing. An administrative order signed by a majority of the Nevada Supreme Court is a final entry of judgment pursuant to Nevada law. *See generally* Nev. Rev. Stat. § 2.140; Nev. Sup. Ct. R. 7(9). Administrative orders are subject to modification by a majority of the court. Nev. Sup. Ct. R. 7(9). Justices Steffen and Springer attempted to modify the administrative order in their December 15, 1995 opinion. However, because their opinion was signed by only two elected Justices of the Nevada Supreme Court, their effort to modify the administrative order was null and void. Nev. Sup. Ct. R. 7(8).

This Court refers to state law to determine the actual effect of a state decision, although state law is not necessarily the controlling factor. *See Cole v. Violette*, 319

U.S. 581, 582 (1943). Under Nevada state law, the unmodified September 15, 1995 administrative order was a final judgment. On this basis, Petitioners' petition was untimely because it was not filed within ninety days of the September 15, 1995 order. If this Court looks beyond Nevada's law to determine the finality of the administrative order, the question is whether the order left "nothing more to be decided" or was an "effective determination of the litigation." *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946) (citations omitted). The July 12, 1996 opinion was filed only to prevent Justices Steffen and Springer from filing further documents in the case, and Petitioners have admitted that the July 12, 1996 order only *reaffirmed* the Nevada Supreme Court's September 15, 1995 administrative order and its April 25, 1996 opinion. Pet. brief at 2. On this analysis, the administrative order was a final judgment because it left nothing more to be decided regarding the appointment of the special master and it constituted an effective determination of the matter.

Petitioners, however, argue that they are seeking to vacate the "Mandamus Order" signed by the Nevada Supreme Court on July 12, 1996. However, the opinion granting the petition for mandamus was filed on April 25, 1996. Assuming that the September 15, 1995 administrative order was not a final judgment, this April 25, 1996 opinion was. The July 12, 1996 supplemental opinion in no way modified the April 25, 1996 opinion. This Court has concluded that a state supreme court's disposal of a writ of prohibition is a final judgment reviewable in the United States Supreme Court. *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954). Because the April 25, 1996 opinion disposed of the writ petition, left "nothing more to be decided," and constituted an "effective determination of the litigation," it was a final judgment. *Richfield Oil Corp.*, 329 U.S. at 72.

Additionally, this Court stated in *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) that

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only where the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Id. at 211-12.

Petitioners have acknowledged that the July 12, 1996 opinion is no more than a reaffirmation of the court's holdings in the September 15, 1995 administrative order and the April 25, 1996 opinion. Pet. brief at 2. Furthermore, the July 12, 1996 opinion did not disturb or revise any legal rights and obligations which had been plainly settled with finality in the court's April 25, 1996 opinion. Therefore, the time to file the writ did not begin to run anew on July 12, 1996, and the instant petition, filed 165 days after the April 25, 1996 opinion, was time-barred because it was not filed within ninety days of the court's final judgment rendered on April 25, 1996.[1]

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[1]Furthermore, the July 12, 1996 opinion also was not issued upon (continued...)

C. Petitioners Lack Standing to File the Petition.

A petitioner must have standing to challenge the action to be adjudicated. *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982). To establish standing, a petitioner must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id.* at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). The injury must be "'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *United States v. Hays*, ___ U.S. ___, ___, 115 S.Ct 2431, 2435 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Claims grounded in "generalized grievances" are inadequate. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Petitioners fail to articulate a personal, particularized, imminent injury upon which standing can be based. Petitioners assert that

> By ignoring the most elemental requirements of due process to decide a case they are disqualified to adjudicate, the Respondent members of the Nevada Supreme Court have heaped ignominy upon the State's judicial system. The nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause cannot permit such a "decision to stand."

Pet. brief at 3 (citation omitted).

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[1](...continued)
rehearing; therefore, the time limits to file an action commenced on April 25, 1996, and not on July 12, 1996. Sup. Ct. R. 13(3).

Petitioners do not identify who has been "deprived of life, liberty, or property without due process of law" by virtue of the September 15, 1995 administrative order or the April 25, 1996 opinion granting the Attorney General's writ petition. Justices Steffen and Springer, either individually or collectively, have not alleged a personal deprivation of life, liberty, or property without due process of law, and Petitioners' claim of injury to "the nationwide system of justice" does not satisfy the standing requirements. *Valley Forge*, 454 U.S. at 471.

Petitioners further argue that this case involves "the right of the public to a properly constituted . . . court." Pet. brief at 25. However, this Court has held that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Petitioners have articulated no injury specific to themselves.

D. Petitioners Never Properly Raised the Issue of Whether Justices Rose and Young Were Disqualified from Hearing the Attorney General's Petition for Writ of Mandamus in the Nevada Supreme Court.

The Attorney General's writ petition named Justices Steffen and Springer as parties and asked the members of the Nevada Supreme Court to enjoin them from entering any more decisions regarding the appointment of the special investigator. On March 15, 1996, Justices Young, Rose, and Shearing filed an order disqualifying Justices Steffen and Springer from considering the merits of the Attorney General's writ petition because the Justices were named parties and Nevada law does not permit named parties to consider the merits of their own cases. Respondents' App.

C, at 19a, 20a. The order permitted Justices Steffen and Springer to file formal motions to disqualify Justices Rose, Young and Shearing, yet no motions to disqualify were ever filed.

This Court will not review a question that has not been "pressed or passed upon" by the courts below. *United States v. Williams*, 504 U.S. 36, 41 (1992). The "usual formulation is: 'It is only in exceptional cases coming [to the United States Supreme Court] from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)). Because this case is appealed from a state court of last resort, the issue must have been pressed or passed upon in the state court of last resort.

Furthermore,

> it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the [Supreme] Court will not undertake to review it.

Williams v. Kaiser, 323 U.S. 471, 477 (1945) (citations omitted); *see Street v. New York*, 394 U.S. 576, 581-82 (1969).

Only in Justice Springer's December 22, 1995 motion to disqualify Justices Rose, Young, and Shearing was it alleged that the Due Process Clause of the United States

Constitution would be violated if they adjudicated the merits of the Attorney General's writ petition. However, the order denying Justice Springer's motion stated that the motion was denied because it failed to conform with the state rules for filing a motion to disqualify a judge, as discussed above; the order did not address the alleged due process violation. Therefore, the federal due process question was not necessary to the determination of the motion to disqualify, the issue was not "pressed or passed on" by the Nevada Supreme Court, and this Court should not undertake to review it.

Additionally, NRAP 35(a) states that any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be waived. Because Petitioners never filed a formal motion to disqualify Justices Young and Rose based on either Justices' alleged biases or prejudices, and never moved for rehearing based upon that allegation, Petitioners waived this issue and the Supreme Court should not consider the merits.

E. The Alleged Bias Asserted by Petitioners Does Not Present an Issue of Constitutional Concern.

Petitioners' brief cites *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), for the proposition that a judge who is disqualified from a case can not return to the case at a later date. However, petitioners ignore the threshold of the *Lavoie* analysis, which is whether the alleged basis for disqualification is of constitutional dimension and therefore a proper subject for this Court to consider.

In *Lavoie*, this Court stated that not "'[a]ll questions of judicial qualification . . . involve constitutional validity.'" *Id.* at 820 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). The *Lavoie* court also stated that "only in the most

extreme cases would disqualification on [the basis of general allegations of bias and prejudice] be constitutionally required." *Id.* at 821; *see also FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (stating that "most matters relating to judicial disqualification [do] not rise to a constitutional level").[2]

In *Lavoie*, the Court concluded that allegations of Justice Embry's general biases against insurance companies were insufficient to raise any constitutional violations. *Lavoie*, 475 U.S. at 821. However, the Court concluded that Justice Embry had a direct, personal, substantial, and pecuniary interest in the outcome of the case and therefore in substance had acted as a judge in his own case. *Id.* at 824.

In the instant case, there was never any finding or admission of bias against any party by either Justice Young or Justice Rose. Furthermore, Petitioners' brief does not suggest how the alleged biases or prejudices of Justices Young and Rose are "direct, personal, substantial, [and] pecuniary interests." *Id.* Petitioners identify no interests that constitutionally required Justices Rose and Young to be disqualified from adjudicating the merits of the Attorney General's writ petition.

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[2]In a previous decision rendered in the merits of the Whitehead case, the Discipline Commission attempted to disqualify Justices Steffen and Springer due to the fact that Justices Steffen and Springer had an alleged financial and personal interest in the case. *Whitehead v. Comm'n on Jud. Discipline*, 873 P.2d 946, 974 (Nev. 1994). In denying the Discipline Commission's motion to disqualify, Justices Steffen and Springer engaged in the same analysis of *Lavoie* presented here, i.e. that not all questions of judicial disqualification rise to a constitutional level and that a direct, personal, substantial, pecuniary interest must be proven for a due process violation to exist. *Id.* at 975.

F. Petitioners' Claim Should Be Dismissed as Moot.

Judge Whitehead has resigned and gone on with his life; the Discipline Commission has proceeded with other business; the special master has ceased to function; the supposed leak from the Discipline Commission has long since become public knowledge. The intramural dispute in the Nevada Supreme Court has come to rest. All the elements of mootness are present.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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